

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

PHASE II CHIN, LLC, *et al.*,

Plaintiffs,

vs.

FORUM SHOPS, LLC, *et al.*,

Defendants.

Case No. 2:08-cv-00162-JCM-GWF

**ORDER**

**Motion to Compel Discovery - #186**

This matter is before the Court on Plaintiff Love & Money, LLC's First Motion to Compel Discovery from the Forum Defendants (#186), filed on January 19, 2010; Caesars Palace Corporation and Caesars Palace Realty Corporation's Opposition to Motion to Compel Discovery From Pure Management Group (#190), filed February 1, 2010; and Defendants' Opposition to Love & Money, LLC's First Motion to Compel Discovery From the Forum Defendants (#192), filed February 2, 2010. The Court conducted a hearing in this matter on February 16, 2010.

**BACKGROUND**

Plaintiffs Phase II Chin, LLC (hereinafter "Chinois") and Love & Money, LLC (formerly d/b/a O.P.M.L.V., LLC) filed this action in the Nevada District Court on January 3, 2008 against Defendants Forum Shop, LLC, Forum Developers Limited Partnership, Simon Property Group Limited Partnership and Simon Property Group, Inc. (hereinafter the "Forum Defendants"), the owners and operators of the Forum Shops Mall, and against Caesars Palace Corp. and Caesars Palace Realty Corp. (hereinafter the "Caesars Defendants"), the owners and operators of Caesars Palace Hotel and Casino and the lessor(s) of the property on which the Forum Shops Mall is located. *Petition for Removal ( #1); Exhibit "A", Complaint.*

1 According to the Complaint, Plaintiff Chinois' predecessor entered into a lease of restaurant  
2 premises in the Forum Shops Mall in 1997. *Complaint* ¶14. In March 2002, Chinois notified the  
3 Forum Defendants of its intent to enter into an agreement with third parties to operate a "first-class  
4 lounge on the second floor of Chinois." Chinois requested that the Forum Defendants give their  
5 preliminary approval to such use. In June 2002, Chinois entered into a management agreement  
6 with O.P.M.L.V. to operate an after hours nightclub on the second floor of Chinois. Plaintiffs  
7 allegedly informed the Forum Defendants about the management agreement with O.P.M.L.V. in  
8 November 2002 and were notified by the Forum Defendants in December 2002 that they approved  
9 the proposed club. The nightclub, which was initially named OPM and later named Poetry, opened  
10 for business on May 23, 2003. Pursuant to an amendment to the lease which became effective on  
11 October 9, 2003, Chinois was permitted to operate OPM Wednesday through Sunday, from 10:00  
12 p.m. until 6:00 a.m. Plaintiffs allege that Defendants were aware at all times of the nature of  
13 OPM's business and approved of its operation. *Id.*, ¶¶ 17- 25.

14 Plaintiffs allege that in January 2005, Defendants began a concerted campaign of  
15 harassment and misconduct intended to drive the Plaintiffs' nightclub out of business.<sup>1</sup> *Complaint*,  
16 ¶ 27. They allege that there were two motives for Defendants' harassment campaign. One of the  
17 alleged motives was Defendants' hostility toward, and prejudice against, African-Americans, who  
18 comprised a majority of OPM's clientele. *Id.* The other alleged motive was that Chinois' rent was  
19 "below market" and that Defendants could charge a new tenant substantially higher rent if Plaintiffs  
20 were forced out of the lease. *Id.*, ¶29. Plaintiffs allege that as part of the campaign to drive them  
21 out of business, Defendants blamed them for altercations or incidents involving disorderly conduct  
22 that occurred in the Forum Shops Mall or Caesars Palace even though there was no evidence that  
23 the individuals involved in the incidents were customers of Plaintiffs. Plaintiffs allege that the  
24 Forum Defendants began serving Chinois with notices of default under the lease "for even the most  
25 minor perceived transgression." *Id.*, ¶¶ 31-32. Plaintiffs cite various incidents that occurred in  
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27 <sup>1</sup> Plaintiffs' reference to "defendants" in the plural indicates that the allegations are directed  
28 against both the Forum Defendants and the Caesars Defendants.

1 Caesars Palace or the Forum Shops Mall on and after December 25, 2004 that Defendants blamed  
2 on OPM customers despite the alleged lack of information to support such accusations. *Complaint*,  
3 ¶¶ 33-42.

4 On March 6, 2006, the Forum Defendants sent a letter to Chinois stating that it was in  
5 breach of the lease for having possibly entered into a sublease for the portion of its premises on  
6 which the nightclub was operated without obtaining the landlord's prior consent to do so.  
7 Secondly, the Forum Defendants stated that Chinois was in breach of the provision of the lease  
8 which required the tenant to operate the club "in a first class manner in keeping with the standards  
9 of the Center . . . ." In support of this statement, the Forum Defendants cited numerous fights and  
10 other altercations or incidents involving the nightclub and its patrons. *Id.*, ¶¶ 43-46. Chinois  
11 responded to the Forum Defendants' notice of default by challenging the assertion that it had sublet  
12 the premises in violation of the lease or that Plaintiffs had failed to operate the OPM nightclub in a  
13 manner consistent with the standards of the lease. *Id.*, ¶¶ 47-48. Following this exchange,  
14 additional altercations or security related incidents occurred which Plaintiffs allege were also  
15 falsely blamed on OPM and/or its patrons. The Forum Defendants sent further notices of default to  
16 Chinois based on these incidents which Plaintiffs again disputed. *Id.*, ¶¶ 51-57.

17 Following a shooting incident inside the Caesars Palace casino in August, 2007, the Caesars  
18 Defendants began closing the entrance door between the Forum Shops Mall and Caesars Palace at  
19 1:00 a.m. and reopening the entrance at 8:00 a.m. This closure did not affect other mall tenants  
20 whose businesses closed prior to 1:00 a.m. Plaintiffs allege that the closure severely harmed their  
21 business because their patrons were only able to enter the mall and nightclub through a circuitous  
22 and somewhat hidden route. The closure also allegedly caused Plaintiffs' customers to believe that  
23 the nightclub was no longer in business. *Complaint*, ¶¶ 58-64.

24 Plaintiffs' Complaint alleges claims against the Forum Defendants and/or the Caesars  
25 Defendants for declaratory relief, intentional interference with contractual relations, interference  
26 with prospective business advantage, violation of 42 U.S.C. §1981 based on Defendants' alleged  
27 hostility toward African-Americans, breach of lease, conspiracy, and breach of the covenant of  
28 good faith and fair dealing. The Forum Defendants have counterclaimed against Plaintiffs. As part

1 of their counterclaim, the Forum Defendants allege that Plaintiffs permitted the OPM/Poetry  
2 nightclub to be operated in a manner that creates an environment that results in rowdy and unruly  
3 behavior, including fights, assaults and batteries on customers and security personnel and  
4 disorderly behavior requiring the repeated attention of security personnel and the police. *Second*  
5 *Amended Counterclaim* (#140), ¶7. The Forum Defendants assert causes of action for damages  
6 against Chinois and Love & Money, LLC for breach of contract, fraud, and conspiracy. *Id.*, ¶¶ 21-  
7 46.<sup>2</sup>

8 Plaintiff Love & Money, LLC's motion to compel requests that the Forum Defendants be  
9 ordered to produce four categories of documents or information. First, Plaintiffs seek to compel  
10 Defendants to answer interrogatories and produce documents identifying any racially disparaging  
11 remarks that Defendants' employees, whether executive, managerial or otherwise, have made about  
12 the OPM/Poetry nightclub, its patrons, employees, or associations. The Forum Defendants  
13 objected to these discovery requests on the grounds that they are vague, ambiguous, unintelligible,  
14 overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of  
15 admissible evidence. *Defendants' Opposition to Motion to Compel* (#192), p. 2 (quoting  
16 Defendant's responses to Interrogatory No. 13 and Request for Production No. 50.)

17 Second, Plaintiffs seek to compel the Forum Defendants to produce all documents or things  
18 generated, reviewed or circulated by or among the legal departments of the Forum Defendants and  
19 the Caesars Defendants related to or involving the removal of the OPM/Poetry nightclub from the  
20 Forum Shops or any alleged default by Chinois under the lease relating to the operation of the  
21 OPM/Poetry nightclub. The Forum Defendants stated that they had produced documents relevant  
22 to these requests except for documents containing privileged information which are listed on the  
23 Defendants' privilege logs. *Opposition* (#192), pp. 2-3, (quoting Defendants' response to Request  
24 No. 56.). The Defendants also assert that certain documents exchanged between the Forum and  
25 Caesars Defendants contain confidential attorney-client communications or attorney work product  
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27 <sup>2</sup> The Court was advised during the February 16<sup>th</sup> hearing that Chinois filed for bankruptcy  
28 in or about July 2010 and that Plaintiffs ceased operations in the Forum Shops at the end of July.

1 that are protected from disclosure pursuant to the joint defense agreement between the Defendants.  
 2 Plaintiffs also seek production of any and all documents reflecting or concerning a joint defense  
 3 agreement between the Forum Defendants and the Caesars Defendants. Defendants objected to  
 4 Plaintiffs' request for production of the agreement on the grounds of burdensomeness, lack of  
 5 relevance and that the documents are "protected from discovery by the joint defense doctrine."  
 6 *Opposition* (#192), p. 2 (quoting Defendants' response to Request for Production No. 17).

7 Finally, Plaintiffs seek to compel the Forum Defendants to produce "all manuals, policies,  
 8 procedures, journals, logs, records, notes, telephone logs, or records, emails, memoranda, repair  
 9 records, inspection records, engineering records, system evaluations, certifications, and any other  
 10 documents or things related to the design, operation, function, and/or use of the Life Safety System  
 11 in operation at the Forum Shops at Caesars Palace from 2003 to August 2009, specifically  
 12 including but not limited to the function and utility of the Won door." *Motion to Compel* (#186),  
 13 *Exhibit "F"*, *Request for Production No. 60*. Defendant objected to this request on the grounds  
 14 that it over broad, unduly burdensome and not reasonably calculated to lead to the discovery of  
 15 admissible evidence. *Opposition* (#192), p. 2 (quoting Defendants' response to Request for  
 16 Production No. 60). Plaintiff's ground for requesting this information is apparently based on a  
 17 December 22, 2007 email that the Forum Shops' director of security sent to Caesars Palace  
 18 regarding a malfunction in the operation of the "Won door" between Caesars Palace and the Forum  
 19 Shops. The email indicates that the malfunction may have been due to Caesars' decision to use the  
 20 door as a control point, i.e., to close the door on a nightly basis because of the alleged security  
 21 issues involving the OPM/Poetry nightclub. *Motion* (#186), *Exhibit "H"*.

## 22 DISCUSSION

### 23 **1. Plaintiff's Failure to Comply with Fed.R.Civ.Pro. 37(a)(1) and Local** 24 **Rule (LR) 26-7.**

25 Before discussing the substantive discovery issues in this matter, the Court first addresses  
 26 the procedural deficiencies in Plaintiff's motion to compel. Local Rule (LR) 26-7(a) of this district  
 27 states that all motions to compel discovery or for protective order shall set forth in full the text of  
 28 the discovery originally sought and the response thereto, if any. Plaintiff's motion to compel did

1 not comply with this requirement. As a result, it was difficult for the Court to determine from the  
2 motion which specific discovery requests Plaintiff was seeking to enforce. The Court, instead, had  
3 to rely on Defendants' Opposition (#192) which sets for the text of the discovery requests and  
4 responses in dispute. (Plaintiff did not contest the accuracy of Defendants' statement as to which  
5 discovery requests are at issue). Plaintiff's counsel are cautioned that they are required to comply  
6 with LR 26-7(a), the obvious purpose of which is to allow the Court, as well as the opposing party,  
7 to readily identify the discovery requests and responses in dispute.

8 A more significant deficiency relates to Plaintiff's counsels' certification pursuant to LR 26-  
9 7(b) that they "personally consulted with counsel for the Forum Defendants and that despite a  
10 sincere and good faith effort on the part of undersigned counsel, this matter could not be resolved  
11 without court action." *Motion to Compel* (#186), p.4, ¶ 12. LR 26-7(b) states that discovery  
12 motions will not be considered unless a statement of moving counsel is attached to the motion  
13 certifying that after sincere effort to do so, counsel have been unable to resolve the matter without  
14 court action. The local rule is in addition to the requirement in Rule 37(a)(1) of the Federal Rules  
15 of Civil Procedure which requires "a certification that the movant has in good faith conferred or  
16 attempted to confer with the person or party failing to make disclosure or discovery in an effort to  
17 obtain it without court action."

18 *Shuffle Master, Inc. v. Progressive Games, Inc.*, 170 F.R.D. 166, 170 (D. Nev. 1996) states  
19 that Rule 37(a)(1) requires the moving party to adequately set forth in the motion essential facts  
20 sufficient to enable the court to pass a preliminary judgment on the adequacy and sincerity of the  
21 good faith conferment between the parties. This includes the names of the parties who conferred or  
22 attempted to confer, the manner by which they communicated, the dispute at issue, as well as the  
23 dates, times, and results of their discussions, if any. In addition to providing the certification  
24 required by Rule 37(a)(1), the movant must, of course, have actually performed as required by the  
25 rule. "Good faith" is not shown merely through the perfunctory parroting of the certification  
26 language. Instead, the rule mandates a genuine attempt to resolve the discovery dispute through  
27 non-judicial means. This generally requires a face-to-face or telephonic conference between the  
28 parties' counsel to discuss and attempt to resolve the dispute. *Shuffle Master, supra*.

1 In *Cotacom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 456, 459 (D.Kan.  
2 1999), the court described what should occur in a meaningful meet and confer conference:

3 When the dispute involves objections to requested discovery, parties  
4 do not satisfy the conference requirements simply by requesting or  
5 demanding compliance with the requests for discovery. The parties  
6 need to address and discuss the propriety of asserted objections.  
7 They must deliberate, confer, converse, compare views, or consult  
8 with a view to resolve the dispute without judicial intervention. They  
9 must make genuine efforts to resolve their dispute by determining  
precisely what the requesting party is actually seeking; what  
responsive documents or information the discovering party is  
reasonably capable of producing; and what specific, genuine  
objections or other issues, if any, cannot be resolved without judicial  
intervention.

10 See also *Koninklijke Philips Electronics v. KXD Technology, et.al.*, 2007 WL 631950 (D.Nev.  
11 2007) \*2.

12 Defendant's Opposition (#192) did not address Plaintiff counsels' certification regarding  
13 efforts to meet and confer. In response to a question from the Court during the hearing, however,  
14 Defendants' counsel indicated that Plaintiff's counsel had not attempted to meet and confer in  
15 regard to the issues raised in the motion. The Plaintiff's attorney who allegedly conducted the meet  
16 and conference, Louren Oliveros, was not present at the hearing and Plaintiff's other counsel, Mr.  
17 Gorence, was unable to state whether there had, in fact, been an actual effort to confer with  
18 Defendants' counsel prior to filing the motion. If there was such a conference, it does not appear  
19 that Plaintiff's counsel offered to narrow the over broad discovery requests. Nor does it appear that  
20 there was any meaningful discussion by the parties' counsel regarding the extent or validity of  
21 Defendants' privilege objections. The Court therefore concludes that Plaintiff has not complied  
22 with the requirements of Rule 37(a)(1) and LR 26-7(b) and on that ground alone, the motion to  
23 compel could be denied. The Court will, however, address the merits of the Plaintiffs' motion in  
24 regard to the issues relating to privilege, because the issues are not likely to be resolved through a  
25 dispute resolution conference between the parties.

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2. **Plaintiff's Requests for Production of Documents Containing Communications Allegedly Protected Under the Attorney-Client Privilege and/or Work Product Doctrine.**

Plaintiff's Request for Production No. 56 requests documents that were generated, reviewed, or circulated by or among the legal departments of the Forum and Caesars Defendants. This request, by its nature, seeks information that is likely to be within the scope of the attorney-client privilege or the work-product doctrine. It is not unusual that in response to such a broad request, Defendants would identify numerous documents in a privilege log based on the assertion of the attorney-client privilege or work-product doctrine. This is especially true in view of the fact that the dispute between Plaintiffs and Defendants was ongoing for approximately three years before the lawsuit was filed. Thus, Plaintiff's argument that Defendants have asserted the attorney-client privilege in an excessive manner is not persuasive.

The attorney-client privilege protects confidential disclosures made by a client to an attorney in order to obtain legal advice, as well as an attorney's advice in response to such disclosures. *In re Grand Jury Investigation*, 974 F.2d 1068, 1070 (9th Cir.1992). Because it impedes the full and free discovery of the truth, the attorney-client privilege is strictly construed. *Weil v. Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18, 24 (9th Cir. 1981); *United States v. Ruehle*, 583 F.2d 600, 607 (9th Cir. 2009). This does not mean, however, that the privilege is disfavored. Within its confines, the privilege serves an important purpose of encouraging full and frank communication between the attorney and the client and thereby promotes broader public interests in the observance of law and administration of justice. *In re Teleglobe Communications Corporation*, 493 F.3d 345, 360, 361 n. 13 (3rd Cir. 2007), citing *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682 (1981). The burden is on the party asserting the attorney-client privilege to show that it applies to a given set of documents or communications. The party must demonstrate that its documents adhere to the essential elements of the attorney-client privilege, which the court has defined as follows: (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the



1 protection be waived. *In re Grand Jury Investigation*, 974 F.2d at 1071 n. 2.

2 The party asserting the attorney-client privilege must make a *prima facie* showing that the  
3 privilege protects the information the party intends to withhold. One method for establishing the  
4 privilege is the submission of a privilege log which identifies (a) the attorney and client involved,  
5 (b) the nature of the document, (c) all persons or entities shown on the document to have received  
6 or sent the document, (d) all persons or entities known to have been furnished the documents or  
7 informed of its substance, and (e) the date the document was generated, prepared, or dated. *See*  
8 *Diamond State Ins. Co. v. Rebel Oil Co.*, 157 F.R.D. 691, 698 (D. Nev. 1994), citing *In re Grand*  
9 *Jury Investigation*, 974 F.2d at 1071 and *Dole v. Milonas*, 889 F.2d 885, 888 n. 3, 890 (9th  
10 Cir.1989). Parties sometimes assume that a privilege log that complies with items (a)-(e) is all that  
11 is required to make the *prima facie* showing. While this may often be true, in some cases a  
12 privilege log, alone, does not establish the existence of the privilege. In those instances, affidavits  
13 may also be required to answer any necessary questions left open by the log.

14 In this case, the Forum Defendants served Plaintiff with privilege logs identifying the  
15 documents as to which Defendants assert the attorney-client privilege, the work-product doctrine  
16 and/or the joint defense agreement. Defendants also provided Plaintiff with an amended privilege  
17 log shortly before the February 16<sup>th</sup> hearing and they have since provided a copy of the amended  
18 privilege log to the Court, together with a list identifying the individuals listed in the log and their  
19 employers and whether they are attorneys. The Forum Defendants also state that they entered into a  
20 joint defense agreement with the Caesars Defendants on June 10, 2009, but it is their position that  
21 the effective date of the joint defense agreement is March 6, 2006 which was the date that the  
22 Forum Defendants sent notice of default to Plaintiff Chinois under the terms of the lease. *See*  
23 *Complaint*, ¶¶43-48. Defendants have also provided the Court with a copy of the March 6, 2006  
24 notice of default letter.

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1 Plaintiff makes various arguments as to why the attorney-client privilege should not apply  
2 in this case.<sup>3</sup> First, Plaintiff asserts that Defendants' privilege objections should be overruled  
3 because the requested documents are highly relevant. This argument is without merit. Confidential  
4 communications between a client and his attorney concerning the facts or legal issues in the case  
5 are by their nature relevant and, if disclosed, may constitute material admissions. The attorney-  
6 client privilege, however, protects such communications from disclosure in order to serve other  
7 legitimate interests. *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682. Next,  
8 Plaintiff argues that the attorney-client privilege should be overruled because this case involves  
9 allegations of egregious racial discrimination. This argument is also without merit. The privilege  
10 applies to all variety of matters upon which a client may seek confidential legal advice. This  
11 includes cases in which the client is accused of the most serious criminal misconduct. Needless to  
12 say, Plaintiff has not provided any legal authority that the privilege does not apply in cases  
13 involving allegations of racial discrimination.<sup>4</sup>

14 Plaintiff also argues that the attorney-client privilege or work-product doctrine may not be  
15 used as both a shield and a sword. In support of this assertion, Plaintiff cites *Chevron Corp. v.*  
16 *Pennzoil Co.*, 974 F.2d 1156, 1162-63 (9<sup>th</sup> Cir. 1992). *Chevron*, however, dealt with the situation  
17 in which a party affirmatively places the advice of his attorney in issue by relying on it to support  
18 the party's claim or defense. In such circumstances, the party impliedly waives the attorney-client  
19 privilege in regard to communications relating to the subject matter of the attorney's advice.  
20 Before waiver of the privilege is imposed, however, the court is required to give the holder of the  
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22 <sup>3</sup> Plaintiff has not challenged Defendants' objections based on the work-product doctrine,  
23 except to the extent that work-product protection may have been waived by disclosure of the  
24 documents to the Caesars Defendants. Accordingly, the Court will not address whether the work-  
25 product doctrine has been validly asserted, other than to note that it generally protects the mental  
impressions or thought process of a party's attorney made in anticipation of litigation.

26 <sup>4</sup> Plaintiff has not asserted that the crime-fraud exception to the attorney-client privilege  
27 applies in this case. See *In re Napster, Inc. Copyright Litigation*, 479 F.3d 1078 (9<sup>th</sup> Cir. 2007).  
28 The party asserting the crime-fraud exception has the burden of proving by a preponderance of the  
evidence that the exception applies.

1 privilege the choice of either waiving the attorney-client privilege or withdrawing the assertion of  
 2 advice of counsel as a basis for its claim or defense. *Bittaker v. Woodford*, 331 F.3d 715, 720 (9<sup>th</sup>  
 3 Cir. 2003). In this case, the Forum Defendants have not alleged reliance on the advice of counsel  
 4 as a defense to Plaintiff's claims. Accordingly, the Forum Defendants have not waived the  
 5 attorney-client privilege on this basis.

### 6 **3. Joint Defense or Common Interest Privilege or Doctrine.**

7 The attorney-client privilege is generally waived if the communication is voluntarily  
 8 disclosed to a third person. The party asserting the privilege has the burden of showing that the  
 9 privilege has not been waived. *Weil v. Investment/Indicators, Research and Management, Inc.*, 647  
 10 F.2d at 24. In this case, the Forum Defendants assert that certain communications between the  
 11 Forum and Caesars Defendants are protected from disclosure pursuant to the joint defense  
 12 agreement between the Defendants. In *Waller v. Financial Corp. of America*, 828 F.2d 579, 583 n.  
 13 7 (9<sup>th</sup> Cir. 1987), the Ninth Circuit noted that the joint defense privilege, which is an extension of  
 14 the attorney-client privilege, has long been recognized by this circuit. *Waller* further stated that  
 15 confidential communications between a client and his own lawyer remain privileged when the  
 16 lawyer subsequently shares them with the co-defendants' lawyers for purposes of pursuing a  
 17 common defense. *Id.*, citing *U.S. v. McPartlin*, 595 F.2d 1321, 1226 (7<sup>th</sup> Cir. 1979).

18 As *Waller* indicates, the joint defense privilege originated in criminal prosecutions. In *In*  
 19 *re Teleglobe Communications Corporation*, 493 F.3d 354, 364 (3<sup>rd</sup> Cir. 2007), the Third Circuit  
 20 noted that the joint defense privilege has since been replaced by a broader privilege that protects  
 21 confidential attorney-client communications shared within a "community of interest" in civil and  
 22 criminal litigation and even in purely transactional contexts. Although characterized by some  
 23 courts as a privilege, the common interest privilege or doctrine is not an independent privilege, but  
 24 is, instead, an exception to the general rule that the attorney-client privilege is waived when  
 25 privileged information is disclosed to a third party.<sup>5</sup> *Broessel v. Triad Guaranty Ins. Corp.*, 238  
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27 <sup>5</sup>For simplicity, the Court uses the term "common interest privilege," although it may be  
 28 more proper to refer to it as a doctrine or as an exception.

1 F.R.D. 215, 219 (W.D.Ky. 2006); *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 579  
 2 (N.D.Cal. 2007); *North American Rescue Products v. Bound Tree Medical, LLC*, 2009 WL  
 3 4110889 (S.D. Ohio 2009) at \*7.

4 The elements of the common interest privilege require (1) that both parties' interests be  
 5 identical, not similar, (2) that the common interest is legal, not solely commercial, and (3) that the  
 6 communication is shared with the *attorney* of the member of the community of interest. *Carl Ziess*  
 7 *Vision Intern'l GMBH v. Signet Armorlite*, 2009 WL 4642388 (S.D. Cal. 2009) at \*7. The Third  
 8 Circuit, in *Teleglobe*, explained that "[t]he requirement that the clients' separate attorneys share  
 9 information, and not the clients themselves, derives from the privilege's roots in the old-joint  
 10 defense privilege which was developed to allow attorneys to coordinate their clients' criminal  
 11 defense strategies." *Teleglobe*, 493 F.3d at 364-65. The court stated that the attorney-sharing  
 12 requirement helps prevent abuse of the privilege by ensuring that the common-interest privilege  
 13 only supplants the disclosure rule when attorneys, not clients, decide to share information in order  
 14 to coordinate legal strategies. *Id.* The Third Circuit did not specify, however, whether the common  
 15 interest privilege applies when the communication is between a party and the attorney for the other  
 16 party in the community of interest.

17 Most courts require that the common interest be a legal rather than a solely business  
 18 interest. *Broessel*, 238 F.R.D. at 220, citing *Libbey Glass, Inc. v. Oneida, Ltd.*, 197 F.R.D. 342,  
 19 348 (N.D. Ohio 1999) and *Bank Brussels Lambert v. Credit Lyonnais*, 160 F.R.D. 437, 447  
 20 (S.D.N.Y. 1995). The fact that a business interest overlaps with the common legal interest,  
 21 however, does not defeat the common interest privilege. *Teleglobe*, 493 F.3d at 365, citing *Duplan*  
 22 *Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 11466, 1174 (D.S.C. 1974). The view that purely  
 23 commercial or business interests may be sufficient to support application of the common interest  
 24 privilege is represented by *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 115 F.R.D. 308 (N.D.Cal.  
 25 1987). In that case, the defendant disclosed, to a prospective purchaser of a division of its business,  
 26 a confidential attorney opinion letter regarding whether a product manufactured by the division  
 27 infringed on plaintiff's patent. The court believed that defendant and the prospective purchaser had  
 28 a common legal interest in the subject matter of the letter based on the likelihood that they would

1 both be sued for patent infringement by the plaintiff if the purchase was consummated. Because  
 2 the court was not completely convinced that a common legal interest existed, however, it also  
 3 justified the application of the common interest privilege on policy grounds to promote reasonable  
 4 and necessary disclosures in business transactions.

5 Although some courts have followed *Hewlett's* broader view of the scope of the common  
 6 interest privilege, other courts have rejected such an expansion. See *Nidec Corp. v. Victor Co. of*  
 7 *Japan*, 249 F.R.D. 575, 579 (N.D.Cal. 2007) (citing cases both in support of and against an  
 8 expanded scope of the privilege). *Nidec* stated, however, that “[p]roperly read, *Hewlett* did not  
 9 take issue with the basic requirement of the common interest exception that the parties must have ‘a  
 10 common legal, as opposed to commercial interest.’” *Id.* The court noted that the parties in *Hewlett*  
 11 did, in fact, have a common legal interest regarding possible infringement of plaintiff’s patent,  
 12 based on the likelihood that they would both be sued if the sale was consummated.

13 In determining whether the common interest privilege applies, *Nidec* also states:

14 [E]ven if there were a common legal interest, the common interest  
 15 exception requires that the communication at issue be “designed to  
 16 further *that* [legal] effort.” *Bergonzi*, 216 F.R.D. at 495 (emphasis  
 17 added). In context of the instant case, the disclosures which concern  
 18 the instant litigation, to be protected, must be made in the course of  
 19 “formulating a *common legal strategy*, *Libbey Glass, Inc.*, 197 F.R.D.  
 20 at 348, or otherwise furthering the parties’ joint interest in this  
 21 litigation. See also *In re Beville, Bresler & Schulman Asset Mgmt.*  
 22 *Corp.*, 805 F.2d 120, 126 (3d Cir.1986) (stating that joint defense  
 privilege requires that “the statements were designed to further the  
 [joint defense] effort”); *Lectrolarm Custom Systems, Inc. v. Pelco*  
*Sales, Inc.*, 212 F.R.D. 567, 572 (E.D.Cal.2002) (noting that  
 “doctrine only protects communication when they are part of an  
 ongoing and joint effort to set up a common defense strategy”);  
 accord *United States ex rel., Burroughs v. DeNardi Corp.*, 167  
 F.R.D. 680, 685 (S.D.Cal.1996).

23 *Nidec*, 249 F.R.D. at 579-80.

24 Other courts have stated that there must also be an actual agreement between the parties to  
 25 pursue a common legal strategy and share confidential attorney-client information. Although a  
 26 written agreement is the most effective method of establishing a common interest agreement, an  
 27 oral agreement whose existence, terms and scope are proved by the party asserting it, may provide a  
 28 basis for the requisite showing. *Intex Recreation Corp. v. Team Worldwide Corp.*, 471 F.Supp.2d

1 11, 16 (D.D.C. 2007), citing *Minebea Co. v. Papst*, 228 F.R.D. 13, 16 (D.D.C. 2005). A written  
2 agreement does not avoid waiver, however, if a common legal interest does not, in fact, exist  
3 between the sharing parties. See *United States v. Bergonzi*, 216 F.R.D. 487, 496 (N.D.Cal. 2003).  
4 Finally, it is not necessary that the parties have a common legal interest or strategy in regard to all  
5 matters involved in the dispute or transaction. See *Perry v. Televisa S.A.*, 2009 WL 2876198  
6 (C.D.Cal. 2009) at \*2 (plaintiff and third party had a common legal interest “even if, at times, they  
7 may have had differing strategic aims or tactics.”)

8 In this case, the Forum Defendants state that they entered into a written Joint Defense  
9 Agreement on June 10, 2009. Defendants assert, however, that the “effective date” of the  
10 agreement was March 6, 2006, which is the date that the Forum Defendants sent notice of default  
11 to Plaintiff Chinois. By this statement, the Forum Defendants are apparently contending that the  
12 Forum and Caesars Defendants entered into an oral agreement to share privileged attorney-client  
13 information on or before March 6, 2006. According to the amended privilege log, most, if not all,  
14 of the communications for which the common interest privilege is asserted, occurred in the year  
15 2007.

16 It is plausible that on or about March 6, 2006, counsel for the Forum and Caesars  
17 Defendants agreed to engage in a joint legal strategy to deal with the problems allegedly resulting  
18 from Plaintiff’s nightclub operation. The Forum Defendants have not, however, provided  
19 sufficient evidence to show that there was, in fact, a joint defense or common interest agreement  
20 between them and the Caesars entities as of March 6, 2006. Defendants’ bare assertion regarding  
21 the “effective date” of the joint defense agreement does not satisfy Defendants’ burden.  
22 Defendants must submit affidavits or other evidence that establish the existence and terms of an  
23 oral agreement to engage in a joint legal strategy at the time that Defendants exchanged otherwise  
24 privileged information. *Intex Recreation Corp. v. Team Worldwide Corp.*, 471 F.Supp.2d at 16.

25 Assuming that such an agreement is shown to exist, Defendants’ privilege logs, standing  
26 alone, also do not show that the communications between the Forum and Caesars Defendants were  
27 in furtherance of the parties’ joint legal strategy. The Court recognizes, however, that it is difficult  
28 to make such a showing without disclosing the substance of the communications themselves.

1 Accordingly, it is appropriate for the Court to review the documents *in camera* to determine  
2 whether they are within the scope of the common interest privilege. The contents of the withheld  
3 communications may also be relevant to whether there was an agreement to pursue a joint legal  
4 strategy prior to June 10, 2009.

5 In advance of conducting the *in camera* review, the Court offers some comments regarding  
6 the information provided in Defendants' amended privilege log. Several of the communications  
7 are between attorneys for Caesars Palace and the Forum Defendants and are therefore likely to be  
8 within the scope of the common interest privilege, assuming that it otherwise applies. Some of the  
9 communications, however, appear to be between Forum employees and Forum attorneys. *See e.g.*  
10 Document Nos. 0000110, 0001266 and 001269. While these communications are presumably  
11 protected by the attorney-client privilege, the common-interest privilege does not apply to them if  
12 they were not shared with the Caesars Defendants. Defendants have also asserted the joint defense  
13 privilege to at least one communication on which Tom Kaplan, a representative of Plaintiff  
14 Chinois, is listed as a recipient. *See* Document No. 000082. A document sent to the adverse party  
15 is not within the common-interest privilege. Finally, there may be some listed communications  
16 between Forum and Caesars employees that did not include an attorney for either party. *See*  
17 Document Nos. 0001277 and 0001279. As *Teleglobe, supra*, indicates, the common-interest  
18 privilege does not apply to communications between parties that do not involve at least one of the  
19 attorneys for the community of interest. Therefore, Defendants must provide additional  
20 information to show why such documents are protected under the common interest privilege. The  
21 foregoing references to specific document numbers are not intended to be an exhaustive list of the  
22 documents as which there is or may be a legitimate question regarding application of the common-  
23 interest privilege.

24 The Court will therefore order the Forum Defendants to submit the documents to which it  
25 asserts the joint defense or common-interest privilege for *in camera* review by the Court.  
26 Defendants are also required to further review their privilege log and identify any and all  
27 communications that were disclosed to persons other than Forum or Caesar employees and  
28 attorneys. If such documents exist, then they shall be produced to Plaintiff. Likewise,



1 communications between employees or agents of the Forum and Caesars Defendants, that did not  
2 involve communications with an attorney for either party, shall be produced to the Plaintiff.<sup>6</sup>

3 **4. Plaintiffs' Request for Production of the Joint Defense Agreement.**

4 Plaintiff also seeks to compel production of the Joint Defense Agreement between the  
5 Forum and the Caesars Defendants. Federal courts have generally declined to order production of  
6 a joint defense agreement on the grounds that it is not relevant to the claims or defenses in the  
7 lawsuit and is therefore not discoverable under Rule 26(a). *Ford Motor Co. v. Edgewood*  
8 *Properties, Inc.*, 257 F.R.D. 418, 428 (D.N.J. 2009); *Warren Distributing Co. v. InBev USA*  
9 *L.L.C.*, 2008 WL 4371763 (D.N.J. 2008). A party's mere characterization of a document as a joint  
10 defense agreement, however, is not controlling as to whether it is relevant. *Warren Distributing*,  
11 2008 WL 4371763 at \*3. It is possible, for example, that a joint defense agreement may serve  
12 more than one purpose and that some portions of the agreement may be relevant and discoverable.  
13 *Id.*, citing *Jeld-Wen, Inc. v. Nebula Glasslam International, Inc.*, 2008 WL 756455 (S.D. Fla.  
14 2008). For this reason, the court in *Warren Distributing* ordered that the agreement be submitted  
15 for *in camera* review. It is also appropriate for the Court to review the agreement *in camera* to  
16 determine that such an agreement, in fact, exists and to also verify its effective date and the parties  
17 to the agreement. So long as such information is otherwise provided to the opposing party, it is  
18 unnecessary to order production of the agreement. *Ford Motor Co. v. Edgewood Properties, Inc.*,

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19  
20  
21 <sup>6</sup> The Court will not grant Plaintiff's request that it conduct an *in camera* review of all of the  
22 documents to which Defendants have asserted the attorney-client privilege or work-product  
23 doctrine. Plaintiff has not made valid arguments to overcome Defendants' *prima facie* case for  
24 application of the attorney-client privilege or the work-product doctrine to confidential  
25 communications that were not disclosed to the Caesars Defendants. The Supreme Court has stated  
26 that a district court may, in appropriate circumstances, conduct *in camera* review of allegedly  
27 privileged documents. See *Diamond State Ins. Co. v. Rebel Oil Co.*, 157 F.R.D. 691, 700 n. 3 (D.  
28 Nev. 1994), citing *United States v. Zolin*, 491 U.S. 554, 571-72, 109 S.Ct. 2619, 2630-31 (1989).  
*Zolin* also states, however, that it is not proper for the court to conduct *in camera* review where the  
proponent of the privilege has made the required showing for its application and the party opposing  
the privilege has offered nothing to overcome the assertion of the privilege. In deciding whether to  
conduct *in camera* review of allegedly privileged documents, the district court may also consider  
the burden that such review places on the court. *Zolin*, 109 S.Ct. at 2631.

257 F.R.D. at 428. *See also Fort v. Leonard*, 2006 WL 2708321 at \*3 (D.S.C. 2006); *Broesel v. Triad Guaranty Insurance Corp.*, 238 F.R.D. 215, 217 (W.D.Ky. 2006); and *United States v. Int'l Longshoremen's Ass'n*, 2006 WL 2014093 (E.D.N.Y.2006) (which also held that joint defense agreements were not discoverable because they did not contain information relevant to the claims or defenses.) The Court therefore directs the Forum Defendants to submit the June 10, 2009 Joint Defense Agreement for *in camera* review by the Court. The Court will thereupon determine whether any portion of the agreement should be produced to Plaintiffs.

**5. Plaintiff's Discovery Requests Relating to Racially Disparaging Comments or Remarks and For Documents Relating to Defendants' Life Safety System.**

Plaintiff's Interrogatory No. 13 asked the Forum Defendants to identify any racially disparaging comments or remarks that any of Defendants' employees, whether executive, managerial or otherwise, made about the Poetry nightclub, its patrons, employees or associations. Request No. 50 calls for production of any documents related to such information. Plaintiff asserts that these discovery requests are relevant to Defendants' alleged racially animus against Plaintiff's predominantly African-American clientele.

The Court finds that these discovery requests are unduly vague and overbroad. First, Plaintiff has not provided any factual information suggesting that it has a reasonable basis to believe that any specific officer or managerial employee of the Forum Defendants, involved in dispute regarding Plaintiff's nightclub, made any racially disparaging comments about the Poetry nightclub, its patrons, employees or associations. Plaintiff's request, therefore, appears to be a classic "fishing expedition." Second, the discovery requests are not even limited to Defendants' officers or managerial employees, but would instead require Defendants to potentially interview everyone of their employees from 2003 or 2005 to the present to determine if they made such comments or remarks. The meaning of the term "racially disparaging" is also vague. These discovery requests are therefore facially overbroad and unduly burdensome. *See Carlton v. Union Pacific RR Co.*, 2006 WL 2220977 (D.Neb. 2006) \*5 (holding that similar requests were facially overbroad).

...

1 Plaintiff's Request for Production No. 60 seeks every document relating to "the Life Safety  
2 System in operation at the Forum Shops at Caesars Palace from 2003 to August 2009." This case  
3 does not involve any claim for bodily injury or property damage that would directly implicate the  
4 life safety system in the Forum Shops Mall. The alleged relevancy of this discovery request  
5 pertains to Defendant Caesars' decision in August 2007 to close the fire protection doors (the  
6 "Won doors") at the casino-mall entrance on a daily basis between the hours of 1:00 a.m. and 8:00  
7 a.m. The door is designed to automatically close in the event of a fire alarm. As discussed above,  
8 Caesars began closing this door after a shooting incident. Prior to filing the motion to compel,  
9 Plaintiff took the deposition of the Clark County Fire Department engineer who testified that  
10 closing the door is not contrary to fire safety. He further testified that the Fire Department advised  
11 Caesars that it was permissible to close the door. *Opposition (#192), Exhibit "I", 1/12/10*  
12 *Deposition of Stephen Digiovanni, pp. 13-19.*

13 Notwithstanding the Fire Department engineer's testimony, Plaintiff argued that its request  
14 for documents relating to the Forum Shops life safety system is relevant to show Defendants'  
15 malicious intent toward Plaintiff. This is based on a December 2007 email from the Forum Shops'  
16 director of security to Caesars Palace regarding a malfunction in the door which prevented it from  
17 operating in the normal manner. The Forum Shops security director indicated that the nightly  
18 closing of the door by Caesars' personnel for "control purposes" had caused some unknown  
19 damage to the door and he inquired whether Caesars' representative would have some time to  
20 discuss discontinuing the closure of the door. *Motion (#186), Exhibit "H".* Plaintiff's relevancy  
21 argument, at most, justified a discovery request for any documents regarding other  
22 communications between the Forum and Caesars Defendants relating to the closing of the fire door  
23 or documents relating to other possible malfunctions as a result of the Caesars' nightly closing of  
24 doors after August 2007. There was no relevant basis, however, for Plaintiff to request all records  
25 relating to the Forum Defendants' life safety system, including records that long pre-date the  
26 practice of closing the Won doors because of issues relating to Plaintiff's nightclub.

27 The Court strongly disapproves of Plaintiff's tactics in regard to these extremely overbroad  
28 and substantially irrelevant discovery requests. First, discovery requests, as initially served, should

1 be reasonably limited to obtaining relevant information and avoid imposing an undue burden on  
2 the responding party. Plaintiffs' overbroad requests failed that basic test. Second, prior to filing  
3 the motion, Plaintiff's counsel had an obligation to meet and confer with Defendants' counsel and  
4 explain the arguable relevancy of the discovery requests and, in this case, substantially narrow the  
5 scope of the requests. It was only at the hearing that Plaintiff's counsel, apparently for the first  
6 time, acknowledged the over breadth of the discovery requests and offered to substantially narrow  
7 them. The Court will not reward this noncompliance with the discovery rules by partly granting  
8 Plaintiff's motion to compel. The Court also finds that the relevancy of these discovery requests is  
9 remote, at best. The Court therefore denies Plaintiff's motion to compel Defendants to respond to  
10 Interrogatory No. 13 and Requests for Production Nos. 56 and 60. Accordingly,

11 **IT IS HEREBY ORDERED** that Plaintiff's Motion to Compel Discovery from the Forum  
12 Defendants (#186) is **granted**, in part, and **denied**, in part as follows:

13 1. The Forum Defendants are ordered to submit for the Court's *in camera* review the  
14 documents listed on their amended privilege log to which they have asserted the joint defense or  
15 common interest privilege and the Joint Defense Agreement dated June 10, 2009.

16 2. The Forum Defendants are also ordered to file with the Court and to serve on  
17 Plaintiff, affidavit to support their assertion that the Forum and Caesars Defendants had entered  
18 into a "joint defense" agreement as of March 6, 2006.

19 3. The Forum Defendants shall produce to Plaintiff those documents listed on its  
20 privilege log that are not within the scope of the common interest privilege, because the  
21 communications were disclosed to the Plaintiff's representative or to third parties other than the  
22 Caesars Defendants. The Forum Defendants shall also produce any communications listed on the  
23 amended privilege log that was exchanged between employees of the Forum and Caesars  
24 Defendants, but in which no attorney for either Defendant participated.

25 4. The Forum Defendants shall comply with the foregoing provisions on or within  
26 fourteen (14) days from the filing of this order.

27 ...

28 ...

DATED this 2nd day of March, 2010.

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